No. 87-1765

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NICHOLAS MELLAS and HARRY MARTIN (deceased),

Petitioners,

vs.

THOMAS PATRICK WALSH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Are government officials entitled to qualified immunity where the cause of action for which damages were awarded was not clearly established at the time the officials acted?

II. Does the failure to review inmate files prior to cell placement constitute a violation of an inmate's Eighth Amendment right to be free from cruel and unusual punishment?

III. Could the defendants waive qualified immunity in a case tried prior to this Court's decision in *Harlow v. Fitzgerald*, by not raising the issue in a motion for summary judgment where the issue was raised in the answer, at trial and in a post-trial brief?

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Nicholas Mellas and Harry Martin, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on January 21, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 837 F.2d 789 (7th Cir. 1988) ("*Walsh II*") and is attached as an appendix (App. A).

Also attached is the original unpublished memorandum order of the United States District Court for the Northern District of Illinois entered December 22, 1982. (App. B). That order was appealed and the Seventh Circuit's opinion, *Walsh v. Brewer*, 733 F.2d 473 (7th Cir. 1984) ("*Walsh I*"), the first appeal of this case, is attached (App. C). Also attached is the unpublished July 16, 1988 memorandum and order of the United States District Court for the Northern District of Illinois, the order from which petitioners herein appealed to the Seventh Circuit (App. D). Finally, the August 1, 1986 bench ruling denying the defendants' claim of qualified immunity is attached as App. E.

JURISDICTION

This case was brought under the Eighth and Fourteenth Amendments and 42 U.S.C. § 1983, and therefore the basis of jurisdiction in the district court was the existence of a federal question. 28 U.S.C. §§ 1331, 1343(a)(3) and 1343(a)(4). The basis of jurisdiction in the Court of Appeals was 28 U.S.C. § 1291. Jurisdiction in this Court is vested by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be sub-

jected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In 1973 inmate Thomas Patrick Walsh came to the aid of state prison officials in helping to repulse an attack by inmate gang members. Following completion of his sentence, Walsh was released. Sometime thereafter he was arrested for aggravated kidnapping and deviate sexual assault, convicted, sentenced and in 1979 sent to Stateville Correctional Center. Because of the 1973 incident, Walsh was assigned to a cell in the protective custody unit at Stateville.

Even in protective custody Walsh was afraid. The most secure place in the prison, in Walsh's view, was 24-hour lock-up in Cell House B. Cell House B had two-man cells and was used to house inmates on investigative status. Investigative status was a prison classification for inmates accused but not yet found guilty of violating a prison rule. Cell House B was also used to house the overflow from protective custody, as well as those found guilty of rules violations. To obtain placement in Cell House B, Walsh purposely committed a technical rule violation. As a result, he was issued a disciplinary ticket and placed on investigative status. On January 25, 1979, Walsh was put in an empty cell in Cell House B.

Placing two inmates in a single cell ("double-celling") was routine in Cell House B. Before double-celling inmates found guilty of a rule violation, officials would determine the compatibility of the inmates by reviewing their prison files. This screening procedure, however, did not apply to inmates who were on investigative status, such as Walsh, since such inmates had just been brought to the cell house and there was neither the time nor manpower to check these inmates' files before placing them in the same cell. The guards, however, would use their judgment based on inmate size and the guards' experience. The petitioners Mellas and Martin were the officials at Stateville in charge of inmate security.

On January 25, 1979, inmate Frank Lee was placed on investigative status and put in the same cell with Walsh. Lee weighed only 130 pounds and was considerably smaller than Walsh. Lee was also a member of the Vice Lords, a gang. He had a tatoo "VL" on his chest. Prison officials did not conduct any review of either Lee's or Walsh's prison files before placing the two together. Lee was unaware that Walsh was a gang target. However, Walsh knew, from the tatoo on Lee's chest, that Lee was a member of the Vice Lords.

Walsh testified that he asked the guard not to put Lee in the cell. The guard testified that he could not recall such a request. Sometime during the next morning, Walsh claimed, Lee stabbed him in the back and strangled him with a piece of electrical cord.

At noon on January 26, 1979, several prison officials came to Walsh's cell to adjudicate his disciplinary violation. They saw no wounds and observed nothing unusual. That afternoon Lee attacked Walsh, strangling him with a cord. Prison officials found Walsh with the cord around

his neck, and he was taken to the prison emergency room and then to a nearby hospital.

Walsh's pro se complaint against several Stateville officials sought compensatory and punitive damages for the injuries he had suffered and for inadequate medical treatment. R. Doc. 1. In their answer, Mellas and Martin denied the allegations and pleaded the defense of good faith qualified immunity. R. Doc. 8, 11. Although the defendants' motion for summary judgment omitted a qualified immunity argument (R. Doc. 25), at trial the defendants' counsel argued in both opening and closing arguments that qualified immunity should be granted. Tr. 18, 462-63. At trial, both Mellas and Martin were asked about their subjective "good faith" with respect to their conduct. Tr. 235-36, 258. Finally, in the defendants' post-trial supplemental brief to the district court, there was an extensive argument that qualified immunity should be granted. R. Doc. 75.

The district court held that Mellas and Martin, the two officials primarily responsible for inmate security, were acting under color of state law and that Walsh's constitutional rights were violated by their failure to provide any screening procedures before double-celling inmates on investigative status. App. at 29. The conduct of Mellas and Martin, however, was not the proximate cause of Walsh's injuries because Lee did not attack Walsh as a vengeful gang member. *Id.* Judgment was entered in favor of those two defendants.[1]

On appeal, the Seventh Circuit held that the district court's analysis with respect to the dismissal of Mellas

[1] The other four defendants were found not to have violated any of Walsh's constitutional rights. They are not parties to this petition, nor were they parties to the Seventh Circuit proceedings.

and Martin was "incomplete." App. at 35. The Court held that "risks to an inmate's safety alone may violate his rights." App. at 35. The court of appeals remanded the case for a finding of whether Walsh was exposed to an unconstitutionally high risk of harm and held that:

> [t]o show that the Stateville procedures were unconstitutional, the record must indicate either that assaults occurred so frequently that they were "pervasive," *Murphy*, 653 F.2d at 644, or that Walsh belonged to an identifiable group of prisoners for whom "risk of . . . assault [was] a serious problem of substantial dimensions." *Withers*, 615 F.2d at 161. Absent either of these showings, the district court should hold that Mellas and Martin did not violate Walsh's constitutional rights.

App. at 36.

On remand, the district court found that Walsh was a member of an identifiable group of prisoners for whom risk of assault was a serious problem of substantial dimension, *to wit*: a gang target, and that Mellas and Martin operated a security system which ignored that risk, in that targeted inmates were housed with other inmates without any determination of whether these inmates were members of a vengeful gang. App. at 39. Walsh was awarded $2500.00 as compensatory damages for mental anguish and humiliation for being placed in fear, and $5000.00 in punitive damages. App. at 40-41. On the question of qualified immunity, the district court held that at the time of the violation, a prisoner's right to be free from the risk of assault was clearly established. App. at 43.

On appeal, Mellas and Martin argued, *inter alia*, that they did not act with deliberate indifference to Walsh's constitutional rights and that they were entitled to qualified immunity. The Seventh Circuit rejected both arguments. With respect to the qualified immunity issue the

court of appeals held that the defendants waived the issue in the initial district court proceedings and that even if not waived, the defense of qualified immunity failed because the unlawfulness of the conduct of Mellas and Martin was apparent at the time of the incident. App. at 22.

The petitioners respectfully pray for the issuance of a writ of certiorari to review that decision.

REASONS FOR GRANTING THE WRIT

I.

GOVERNMENT OFFICIALS ARE ENTITLED TO QUALIFIED OFFICIAL IMMUNITY WHERE THE CAUSE OF ACTION WHICH IS THE BASIS OF THE PLAINTIFF'S AWARD IS NOT CLEARLY ESTABLISHED AT THE TIME OF THE CONSTITUTIONAL VIOLATION.

Qualified immunity is a doctrine that reconciles the goal of protecting government officials from being unduly burdened by the threat of potential liability with the competing goals of providing for the redress of deprivations of constitutional rights and deterring officials from abusing their power in derogation of the Constitution. *See Harlow v. Fitzgerald*, 457 U.S. 800, 813-15 (1982); *Butz v. Economou*, 438 U.S. 478, 504-07 (1978); *Scheuer v. Rhodes*, 416 U.S. 232, 239-48 (1974); *Pierson v. Ray*, 386 U.S. 547 (1967). Qualified immunity strikes this balance by shielding government officials from liability for damages insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. *Harlow*, 457 U.S. at 818. The official's entitlement to immunity from damages turns on the objective legal reasonableness of his conduct assessed

in light of legal rules that were clearly established at the time of the conduct. *Anderson v. Creighton*, ____ U.S. ____, 107 S. Ct. 3034 (1987).[2]

Unlike this Court's recent cases addressing qualified immunity, this petition does not focus on the specificity with which the challenged conduct must have been previously identified as unlawful. *See e.g. Anderson, supra.* Rather, this petition presents the question of whether the specific cause of action upon which the plaintiff seeks to prevail must also be clearly established at that time of the challenged conduct.

The court of appeals erred by failing to recognize or lend any credence to the fundamental purpose and rationale for the shield of qualified immunity. Government officials, such as the petitioners, must be able to work in an environment free from the constant threat of personal liability. There are substantial social costs associated with imposing personal financial liability on government officials. These social costs include the expense of litigation, the diversion of official energy from pressing issues of public importance, and the deterrence of able citizens from acceptance of public office. *Harlow*, 457 U.S. at 814. *See also Scheuer*, 416 U.S. at 240. *See generally* P. Schuck, *Suing Government*, 59-121 (1983) (liability for damages creates negative incentives for officials' behavior and causes those officials to engage in self-protection and risk-minimizing

[2] *Anderson* addressed the issue of the level of generality at which the relevant right "legal rule" is to be identified. To strike a balance between the interest in vindication of citizens' constitutional rights and in public officials' effective performance of their duties, *Anderson* held that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 3038.

behavior to the detriment of society as a whole). Accordingly, as recognized in *Davis v. Scherer*, 468 U.S. 183, 195 (1984), government officials can act without fear of harassing litigation only if they reasonably can "anticipate when their conduct *may give rise to liability for damages* and only if unjustified lawsuits are quickly terminated." *Id.* at 197 (emphasis added).

The Seventh Circuit, in the instant case, held that the defendants were not entitled to qualified immunity because their *conduct* (the absence of procedures to screen cellmates in investigative status) violated the clearly established legal rule that they had a duty to protect against inmate-on-inmate attacks. App. at 22, citing *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974).[3] In so ruling, the court implicitly held that for purposes of qualified immunity, only the conduct of the official must be clearly established as unconstitutional. As demonstrated below, the court of appeals erroneously rejected the defendants' argument that the cause of action, the identifiable-group prong of the at-risk theory of liability under the Eighth Amendment right to be free from cruel and unusual punishment—(the sole basis for Walsh's recovery),[4] must also be clearly established.

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[3] *Spence* was a wrongful death action brought by the estate of a deceased state hospital inmate. The inmate had been beaten by a fellow inmate several times and eventually died as a result of a beating. 507 F.2d at 559. In reversing the district court's dismissal, the court acknowledged that under the Fourteenth Amendment, the State has a duty to protect an inmate from attacks by fellow inmates. *Id.* at 557. Although *Spence* dealt this the duty of state officials to protect inmates from assault, the case had nothing to do with an inmate's right to recover for mental distress for merely being placed at *risk* of assault.

[4] The district court on remand held that Walsh, as a gang target, was entitled to relief only because he belonged to an identifiable group for whom risk of assault was a serious problem. App. at 39.

Citing exclusively post-1979 authority, the Seventh Circuit in *Walsh I* held, for the first time, that "[r]isks to an inmate's safety alone may violate his rights." App. at 35. The Court noted the two alternative methods under which a prisoner may recover according to this at-risk theory of liability under the Eighth Amendment. App. at 36. First, if inmate-on-inmate assaults occurred so frequently and were so pervasive that the entire prison population was at risk of assault and thereby placed in a constant state of fear, then a prisoner has a cause of action and may recover for mere mental distress. App. at 36. This is known as the "reign of terror" prong of the at-risk theory of liability under the Eighth Amendment. *See Jones v. Diamond*, 636 F.2d 1364, 1373 (5th Cir.) (*en banc*), *cert. dismissed*, 453 U.S. 950 (1981); *Cannon v. United States*, 645 F.2d 1128, 1129, n.1 (D.C. Cir. 1981); *Woodhous v. Virginia*, 487 F.2d 889 (4th Cir. 1973).[5]

The second cause of action upon which a prisoner may recover for mental distress under the at-risk theory of liability exists when prison officials act with deliberate indifference to an inmate's fear of harm, where that inmate is a member of an identifiable group of prisoners for

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[5] In the landmark case of *Holt v. Sarver*, 442 F.2d 304, 308 (8th Cir. 1971), the Court held that under the Eighth Amendment prisoners are entitled to protection from assaults by fellow inmates. *Woodhous* took the *Holt* rationale and expanded on it, holding that inmates had an Eighth Amendment right to be free from the mere risk of assault. *Woodhous* is the genesis for the at-risk theory of liability of the broad Eighth Amendment right to be free from cruel and unusual punishment. *See Shrader v. White*, 761 F.2d 975, 977-78 (4th Cir. 1985); *Riley v. Jeffes*, 777 F.2d 143, 147 (3rd Cir. 1985); *Porm v. White*, 762 F.2d 635, 636 (8th Cir. 1985); *Ramos v. Lamm*, 639 F.2d 559, 573, *cert. denied*, 450 U.S. 1051 (10th Cir. 1980); *Dawson v. Kendrick*, 527 F. Supp. 1252, 1289-90 (D. W.Va. 1981); *Jordan v. Grzegorek*, 480 F. Supp. 891, 894 (D. Va. 1979).

whom the risk of assault is a serious problem of substantial dimensions. App. at 36, citing *Withers v. Levine*, 615 F.2d 158, 161 (4th Cir.), *cert. denied*, 449 U.S. 849 (1981). The *Withers* court relied on *Woodhous* to establish this new cause of action.[6] Prior to *Withers*, the Eighth Amendment right to be free from risk of assault was essentially confined to the "reign of terror" prong where all prisoners were at risk. *See, e.g., Woodhous, supra.* In creating the new cause of action, the Fourth Circuit implicitly adopted the argument propounded by the petitioners in the instant case. In *Withers* the defendants were granted qualified immunity.[7]

At the time that Mellas and Martin were found to have violated Walsh's right under this theory of liability, no such cause of action existed in the Seventh Circuit or elsewhere. *Withers* was two years hence, and it was the first case to find that a prisoner had a cause of action under this theory and could recover damages for mere mental distress.

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[6] *Withers* involved a prisoner who brought a complaint against prison officials for failure to protect him from sexual assault by fellow inmates. Withers belonged to a group, young prisoners, for whom the risk of sexual assault was a serious problem of substantial dimension. 615 F.2d at 161.

[7] The Court said:

> *Woodhous* only defined the right in broad outline, leaving its precise contours for later definition, and the defendants ought not to be chargeable with foreknowledge of its application here. . . . [T]he immunity question turns not upon the reasonableness or unreasonableness of the defendants' conduct, but upon whether they had reason to believe they were violating a constitutional right. We think the district court properly concluded that they did not.

615 F.2d at 163.

In its first opinion and order, the district court found that the defendants' failure to have screening procedures before double-celling inmates in investigative status was unconstitutional. App. at 28-29. Despite the violation of this duty and the existence of physical injury, the district court found that there was no proximate cause between the unconstitutional conduct and the physical injuries for which he sought monetary relief. App. at 29. In *Walsh I*, the court of appeals affirmed that Walsh had no cause of action for the physical injuries because proximate cause was absent. Nonetheless, the court of appeals recognized an alternative cause of action for Walsh by allowing him to recover for mental distress under the identifiable-group theory of liability. This cause of action was not raised by Walsh in his complaint or at trial; however, on remand he prevailed on it.[8]

In *Walsh II*, the court of appeals held that the defendants' conduct was clearly established as unconstitutional and, therefore, rejected a finding of qualified immunity. App. at 22 (*See* argument II, *infra*). This holding means that the clearly established standard applies only to the unconstitutionality of the conduct and not to the existence or validity of the cause of action upon which the plaintiff bases his claim for monetary recovery. By this petition, Mellas and Martin ask this Court to address the issue of whether the clearly established standard applies only to the official's conduct, or whether this standard also applies to the cause of action.

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[8] This cause of action was first argued by Walsh only after the decision in *Walsh I* in his post-remand brief filed seven years after the incident.

The petitioners in the instant case contend that the court of appeals erred by finding that qualified immunity was not available where the conduct in which they engaged (the absence of any screening procedure for inmates in investigative status) was, in the court's view, clearly established as unconstitutional. (*See* argument II, *infra*). Regardless of the finding that the conduct may have been deemed a violation of some constitutional right, the fact remains that there is no way that Mellas or Martin could have foreseen the possibility of owing an inmate money under the identifiable-group theory of liability. The right to recover under such a cause of action did not exist at the time that Mellas and Martin made the decision not to have screening procedures for inmates in investigative status. In a case such as this, the petitioners might have anticipated that the presence of guards in Cell House B would be sufficient to protect inmates from physical harm and render unnecessary screening procedures; they could not, however, have been expected to anticipate their liability for inmates' fear and the need for screening procedures to forestall lawsuits based solely upon allegations of mental anguish.

It is petitioners' contention that, consistent with this Court's decisions and the policy which qualified immunity serves, the cause of action under which the plaintiff obtains relief must be clearly established at the time of the alleged unconstitutional conduct. If the cause of action upon which liability is predicated is not clearly established at the time of the conduct, then reasonable government officials have no means by which to foresee the financial liability that may arise from their conduct. This question of first impression merits review by this Honorable Court.

II.

THE SEVENTH CIRCUIT'S HOLDING THAT THE FAILURE TO REVIEW INMATE FILES PRIOR TO CELL PLACEMENT VIOLATES A PRISONER'S EIGHTH AMENDMENT RIGHTS IS IN DIRECT CONFLICT WITH THE FIFTH CIRCUIT'S RECENT DECISION IN *JOHNSTON v. LUCAS.*

In *Walsh II* the court of appeals imposed on correctional administrators a duty to conduct some type of review of inmate files prior to cell assignments. App. at 12, 15. The court concluded that the failure to conduct such screening constituted a violation of Walsh's Eighth Amendment rights and was actionable under 42 U.S.C. § 1983. App. at 15-18. This holding is in direct conflict with the decision in *Johnston v. Lucas*, 786 F.2d 1254 (5th Cir. 1986), and accordingly the issue merits review by this Court.

In *Johnston* the plaintiff inmate and his assailant were known enemies, and the assailant had previously told prison guards and an administrator that he intended to knife the plaintiff. 786 F.2d at 1256. Nevertheless, the two were housed in the same building and the assailant stabbed the plaintiff. *Id.* at 1258. The plaintiff sued several administrators claiming that the screening procedures failed to protect him and that the administrators were liable for damages. *Id.* at 1259. In direct conflict with the Seventh Circuit's decision in *Walsh II*, the Fifth Circuit held that although the prison procedures were "obviously inadequate" to protect inmates, the conduct of the prison officials did not constitute deliberate indifference and therefore did not violate the Eighth Amendment. *Id.* at 1260.

This conflict should be resolved in favor of the decision reached in *Johnston*. The holding in *Walsh II* presents prison administrators with an impossible task. Judge Easterbrook, criticizing the *Walsh II* holding in his concurring opinion

in *David K. v. Lane*, 839 F.2d 1265, 1279 (7th Cir. 1988) summarized the problem as follows:

> The administrator even may have a constitutional obligation to arrange housing on the basis of gangs. *See Walsh v. Mellas*, 837 F.2d 789 (7th Cir. 1988), which sustains an award of $7,500 against a prison official who neglected to learn about gang affiliation of prisoner's cellmate and take steps necessary to keep members of one gang away from members of others (or from innocent bystanders). Prison officials must respond to such decisions by ensuring that members of the same gang share cells and activities. This both makes gangs legitimate in the eyes of the inmates and complicates the task of undermining them. To take the very step—preventing the adherents of an organization from fraternizing—is to risk monetary penalties.

By this petition, Mellas and Martin request that this Court resolve the conflict that exists with respect to the issue of whether prison officials violate a prisoner's Eighth Amendment rights by failing to have sufficient screening procedures. The holding in *Walsh II*, that the failure to review inmate files prior to cell assignment is unconstitutional and creates a cause of action for damages, must be reversed.

III.

BECAUSE "GOOD FAITH" WAS A SUBJECTIVE FINDING AT THE TIME OF THE TRIAL IN THIS CASE (PRE-*HARLOW*), THE DEFENDANTS DID NOT WAIVE QUALIFIED IMMUNITY WHERE THAT DEFENSE WAS RAISED IN THE ANSWER AND PRESSED AT TRIAL, EVEN THOUGH NOT RAISED IN A SUMMARY JUDGMENT MOTION.

Qualified immunity is an affirmative defense that must be pleaded. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). In the instant case the defendants satisfied this require-

ment. The court of appeals, however, held that the defendants waived qualified immunity in the initial district court proceeding by failing to "press" the issue. App. at 19. The court of appeals, citing *Harlow v. Fitzgerald*, found that the issue of qualified immunity was omitted from the defendants' motion for summary judgment and was "neither referred to in the brief nor the argument before the trial court." App. at 19 n.6.

Although the court of appeals correctly found that qualified immunity was not argued in the summary judgment motion, it erred in finding that the issue was not pressed.[9] Furthermore, the court of appeals ignored the defendants' justification for not addressing the issue of qualified immunity in their summary judgment motion.

This case was filed and tried *before Harlow*, when the determination of qualified immunity included a subjective good faith component. *Harlow*, 457 U.S. at 815-16. Thus, at the time this case was tried, the question of good faith was a factual determination, the province of the jury. *Id.* at 815 n.27 and cases cited therein. *See also O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975); *Johnson v. Rogers*, 621 F.2d 300, 306 n.7 (8th Cir. 1980). Accordingly, it was proper to omit qualified immunity as an argument in the summary judgment motion.

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[9] The cases upon which the court of appeals relied are inapposite. *E.g. Ohio Cas. Ins. Co. v. Bazzi Const. Co., Inc.*, 815 F.2d 1146, 1149 (7th Cir. 1987) (insurance company waived argument that exclusionary provisions in contract were applicable where no such argument was ever made before trial court); *National Fidelity Life Ins. Co. v. Karaganis*, 811 F.2d 357, 360-61 (7th Cir. 1987) (insurance company waived argument that insured had misrepresented his status as a non-smoker by failing to raise the issue as a distinct argument before the trial court); *Libertyville Datsun Sales v. Nissan Motor Corp.*, 776 F.2d 735, 737 (7th Cir. 1985) (argument concerning an amendment to agreement was waived because the argument was never presented to the trial court).

At trial, when it was appropriate to pursue the qualified immunity defense, counsel pressed the issue in opening argument (Tr. 18) and in closing argument (Tr. 462-63). During the trial each defendant was questioned about his "good faith" conduct. Tr. at 235, 236, 258. Following the trial, the parties submitted briefs to the trial court, and in defendants' supplemental post-trial brief the issue of qualified immunity was extensively argued. R. Doc. 75. Accordingly, the defendants did not waive qualified immunity. On the contrary, the defendants pleaded it in their answer, pressed it at trial and brought it to the district court's attention again in the post-trial brief.

Certiorari must be granted on this issue in order for the qualified immunity issue to be addressed.

CONCLUSION

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-2413

THOMAS PATRICK WALSH,

Plaintiff-Appellee,

v.

NICHOLAS MELLAS and HARRY MARTIN,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 79 C 3512—**James B. Moran,** *Judge.*

ARGUED MAY 21, 1987—DECIDED JANUARY 21, 1988

Before COFFEY and RIPPLE, *Circuit Judges,* and ESCHBACH, *Senior Circuit Judge.*

COFFEY, *Circuit Judge.* Defendants Nicholas Mellas and Harry Martin, prison officials at the Stateville Correctional Center, appeal the district court's award of $2,500 compensatory and $5,000 punitive damages in favor of a Stateville inmate, Thomas Walsh. We affirm.

I.

The plaintiff-appellee Thomas Patrick Walsh ("Walsh"), a state prisoner currently serving sentences for three felony convictions, brought this action against six Stateville officers pursuant to 42 U.S.C. § 1983 (1976) after

Walsh was assaulted by his cellmate (Frank Lee) at the Stateville Correctional Center in 1979 while both were confined in the "investigative status" area of the prison.[1] The trial judge, after conducting a bench trial on his

[1] Inmates assigned to "investigative status" are ordinarily under investigation for a violation of prison rules, or are there for security reasons. Those inmates are placed in cells separate from the general prison population. The district court described the procedure for the double-celling of inmates assigned to investigative status as follows:

> "The procedure established to deal with an inmate's request for 24-hour lockup for protective security reasons was as follows: An inmate would request transfer and receive a resident information report, or 'ticket.' In the ticket, the inmate would be cited for the technical violation of refusing his housing assignment. He would then be 'walked' to cellhouse B by a lieutenant. At cellhouse B the inmate was first held in a holding area, while the cellhouse keeper made a cell assignment.
>
> Cellhouse B had two-man cells. They housed persons on investigative status and protective custody overflow from cellhouse E. An inmate issued a ticket because he was 'walked' to cellhouse B East in order to gain greater personal security by 24-hour lockup was, by the procedures then in force, a person under investigation for a violation and was, therefore, in cellhouse B East in investigative status. He was no longer, in practice, considered to be in protective custody on the ground that he had 'voluntarily' removed himself from that status. There were some restrictions on double-celling of persons in segregation because of adjudicated rules violations, including a requirement that the restrictions did not apply to persons being held on investigative status pending a determination of whether or not there had been a violation. While the cellhouse keeper may have made subjective evaluations of suitable double assignments, based on size, his experience with the inmates then in his charge, and the like, no effort was made to determine specific protective custody needs, checking central records, seeking information concerning specific protective custody needs, screening to reduce the likelihood of violence between cellmates—those simply were not part of the procedure."

(Order of District Court, at p. 2-3).

Eighth and Fourteenth Amendment claims,[2] ruled that placing a gang member in Walsh's cell constituted deliberate indifference toward Walsh's safety in violation of his Eighth Amendment right to be free from cruel and unusual punishment. Even though the trial court found the defendants Mellas and Martin were the two officials primarily responsible for inmate security at Stateville therefore responsible for the constitutional violation, it also ruled that since their conduct was not the proximate cause of the injuries sustained, they were not liable for damages. The court went on to hold that the four other defendants did not violate Walsh's constitutional rights.

Walsh's appeal of the district court's decision led to our first opinion in this case, *Walsh v. Brewer*, 733 F.2d 473, 475 (7th Cir. 1984) ("*Walsh I*"). The court summarized the facts as follows:

> "Walsh was incarcerated at Menard in 1973. While at Menard, Walsh helped officials repulse an attack on a prison office by inmate members of street gangs. After this incident, members of the Disciples and Vice Lords gangs at Menard threatened Walsh. Walsh later was released from Menard.
>
> In 1978 Walsh was sent to Stateville to serve sentences for three felony convictions. Because Walsh feared that gang members at Stateville would retaliate against him for his role in the Menard incident,

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[2] On the facts of this case the relevant constitutional provision is not the Due Process Clause of the Fourteenth Amendment, but is, instead, the Eighth Amendment. "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions . . . . [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 245, 103 S. Ct. 2979, 2983 (1983). Because Walsh was incarcerated and there had been a formal adjudication of guilt against Walsh at the time of his attack, the Eighth Amendment applies.

Walsh asked prison officials to put him in protective custody in Cell House E. The prison officials granted Walsh's request. Walsh still feared for his safety in Cell House E, though, and he asked to be transferred to another prison. Stateville officials denied his request. Walsh then asked to be placed on twenty-four hour lockup in Cell House B, which housed inmates who violated a prison rule or were awaiting a disciplinary committee hearing. Some inmates apparently believed that twenty-four hour lockup was more secure than protective custody, and thus they would commit a technical violation of prison rules to gain admittance to twenty-four hour lockup. In order to be assigned to Cell House B, therefore, Walsh improperly refused his cell assignment and was charged with a disciplinary violation. Walsh was placed in Cell House B on January 24 or 25, 1979.

Stateville officials regularly assigned two men to a cell in Cell House B. Before double-celling inmates guilty of rules violations, officials were required by regulation to determine the prisoners' compatibility by checking their prison files. Prison officials, however, did not apply this regulation to inmates awaiting disciplinary hearings. In these cases, the cell house keeper made double assignments based on his evaluation of the inmates' size and his experiences with the inmates.

The Cell House B keeper assigned Walsh to an empty cell. On January 25, the keeper assigned another inmate, Frank Lee, to Walsh's cell. Lee was a Vice Lords gang member. Defendant Edward Franklin, a lieutenant, took Lee to the cell. Walsh testified that he immediately asked Franklin not to put Lee in the cell; Franklin testified that he could not recall Walsh making such a request. Walsh stated at trial that early the next morning, Lee stabbed him in the back and strangled him into unconsciousness with a wire.

> At noon, the prison Adjustment Committee came to Walsh's cell to adjudicate his disciplinary charge. Defendants Daniels, Drew, and Nelson were the committee members. Walsh testified that he showed the committee members his stab wounds and requested immediate medical attention. The defendants all testified that they neither saw stab wounds nor observed anything unusual about Walsh. The defendants did agree that Walsh asked to go to sick call, and Daniels stated that he conveyed Walsh's request to the cell house keeper in accordance with standard Stateville procedures.
>
> Later that afternoon, Lee assaulted Walsh by repeatedly strangling him with a wire. Prison officials found Lee standing over Walsh with a wire around Walsh's neck. The officers sent Walsh first to the Stateville emergency room, and then to a hospital in Joliet for two days."

This court also summarized the district court's findings with respect to the proximate cause issue:

> "The [district] court stated: 'Plaintiff does not suggest that Lee ever knew plaintiff was a Vice Lords target. The cause of the attack was unrelated to the 1973 Menard incident; Lee attacked Walsh, but not as a vengeful gang member.' R. 79, at 5. The district court further ruled that *prison officials would not have known that Lee was likely to attack Walsh for other reasons even if they had consulted Lee's files.* The court noted that Lee's file showed that he had no history of assaultive behavior at Stateville. In addition, the court declined to assume that Lee's psychological evaluation, which described him as 'sullen, antagonistic, angry, dangerous, explosive, completely peer-oriented,' *would have alerted officials that Lee was more dangerous than many of the other inmates at the Stateville maximum security facility.*"

733 F.2d at 476 (emphasis added). In *Walsh I*, the panel held that the district court's "finding that prison officials

would not have been alerted to the danger of placing Lee with another inmate had they examined Lee's file . . . ," 733 F.2d at 476, was not clearly erroneous. The court also affirmed the trial judge's holding that defendants Franklin, Daniels, Drew, and Nelson did not violate Walsh's constitutional rights. 733 F.2d at 477. However, the Circuit Court in its opinion stated that the "district court's legal analysis is incomplete." *Id.* at 476. As the *Walsh I* panel expressed:

> "The district court's order *does not discuss whether the evidence showed that the inmates at Stateville were exposed to an unconstitutionally high risk* of harm, and thus we vacate and remand the court's decision for further consideration of the evidence. To show that the *Stateville procedures* were unconstitutional, the record must indicate either that assaults occurred so frequently that they were 'pervasive,' . . . or that Walsh belonged to an 'identifiable group of prisoners' for whom 'risk of . . . assault [was] a serious problem of substantial dimension.' "

Id. at 476 (emphasis added). This court vacated "that portion of the court's decision concerning defendants Mellas and Martin," and remanded for consideration of the possibility that Stateville's procedures were inadequate in the protection of inmates confined in "investigative" status against the risk of assault in light of the panel's guidelines set forth above. *Id.* at 477. Finally, the appellate court directed the district court to award "appropriate" damages if it determined that Stateville's procedure for screening inmates assigned to investigative status was unconstitutionally defective. *Id.*

Upon remand, the trial judge applied the *Walsh I* standard and explained and reaffirmed its finding of liability, reasoning that the inadequacy of the prison's screening procedures amounted to a deliberate indifference to Walsh's right to security. The court explained its holding in the following manner:

> "*The Court of Appeals ruled that the evidence must indicate either that assaults occurred so frequently that they were 'pervasive,' or that Walsh belonged to an 'identifiable group of prisoners for whom risk of assault (was) a serious problem of substantial dimensions,' Walsh v. Brewer*, 733 F.2d 473, 476 (7th Cir. 1984). *There was considerable evidence respecting the frequency of assaults. This Court's ruling was not based, however, on that evidence.* Rather, it was based upon the evidence that gang activity was a serious security problem at Stateville at the time, as was known by the two defendants; that the risk of assault by gang members upon inmates targeted by gangs was real and significant; that plaintiff was, and was known to be such a targeted inmate and therefore *a member of a identifiable group of prisoners* for whom risk of assault was a serious problem; and that the two defendants, Mellas and Martin, devised and operated a security system which ignored that risk in that targeted inmates in investigative status were housed with other prisoners without any determination of whether those other prisoners were members of a vengeful gang."

R. 97, at 2 (emphasis added). As the italicized portion of the paragraph indicates, the district court relied on the second theory of liability set forth in *Walsh I*: Walsh's association in an "identifiable group of prisoners for whom the risk of assault is a serious problem of substantial dimension."

Based upon its findings of liability, the trial court awarded Walsh $2,500 for the "personal humiliation and mental anguish and suffering caused by the constitutional violation." R. 97, at 4. The court also concluded that because Mellas and Martin's conduct rose to the level of reckless indifference to Walsh's constitutional rights, an award of $5,000 in punitive damages was appropriate. *Id.* Mellas and Martin appeal these findings.

II.

Initially, the defendants maintain that the district court failed to apply the proper Eighth Amendment standard when determining that the prison's screening procedures violated Walsh's rights. They contend that once a district court finds that the plaintiff is a member of an identifiable group of inmates placed "at risk" of an inmate attack, the plaintiff is also required to demonstrate that the defendant's conduct is so culpable as to rise to the level of "punishment" under the Eighth Amendment. *Duckworth v. Franzen*, 780 F.2d 645, 652-53 (7th Cir. 1985), *cert. denied*, 107 S. Ct. 71 (1986), details the level of culpability necessary for a finding of an Eighth Amendment violation.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual *punishment* inflicted." (Emphasis added). In *Duckworth*, the court emphasized that the mistreatment of prisoners will only rise to the level of *punishment* for Eighth Amendment purposes if "the indifference to a prisoner's welfare [is] deliberate." 780 F.2d at 653 (citing *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L.Ed.2d 251 (1976); *Jones v. Morris*, 777 F.2d 1277, 1280 (7th Cir. 1985)). The court stated:

> "If the word 'punishment' in cases of prisoner mistreatment is to retain a link with normal usage, *the infliction of suffering on prisoners can be found to violate the Eighth Amendment only if that infliction is either deliberate, or reckless in the criminal law sense. Gross negligence is not enough.* Unlike criminal recklessness it does not import danger so great that knowledge of the danger can be inferred; and we remind that the 'indifference' to the prisoner's welfare must be 'deliberate,' e.g., *Estelle v. Gamble, supra*, 429 U.S. at 104, 97 S. Ct. at 291; *Jones v. Morris, supra*, at 1280, implying such knowledge. Although some cases contain language more suggestive of the tort definition of recklessness than of the criminal law definition, *see, e.g., Benson v. Cady*,

> *supra*, 761 F.2d at 339-40; *Estate of Davis v. Johnson*, 745 F.2d 1066, 1071 (7th Cir. 1984); *State Bank v. Camic*, 712 F.2d 1140, 1146 (7th Cir. 1983), they are cases where the prisoner had failed to prove recklessness even in the tort sense, and it was not important therefore whether he would have had to prove even more in order to win the case."

780 F.2d at 652-53 (emphasis added). The distinction drawn in *Duckworth* between "gross negligence" and "reckless disregard" limits the type of factual situations subject to the Eighth Amendment.

In *Estelle*, for example, the Supreme Court held that a prison doctor's failure to order an X ray of plaintiff's lower back did not violate the Eighth Amendment even though it might have amounted to an act of medical malpractice. 97 S. Ct. at 293. The Court explained:

> "But the question whether an X-ray or additional diagnostic techniques or forms of treatment—is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel or unusual punishment. At most it is medical malpractice, and as such the proper forum is the state court under the Texas Tort Claims Act."

Id. Although the failure to order an X ray might, under certain circumstances, be considered negligent, the Court held that:

> "in the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.' Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. *In order to state a cognizable claim, a prisoner must allege acts or omissions suf-*

ficiently harmful to evidence deliberate indifference to serious medical needs."

93 S. Ct. at 292 (emphasis added).

In *Duckworth, supra*, a bus used to transport prisoners between prisons within the state of Illinois caught fire from causes unknown. When the fire broke out, the thirty-five prisoners in the bus were handcuffed together, and all exits of the bus except the front door were secured. Twenty-one of the injured prisoners sued three prison officials and three guards under § 1983, charging that the failure to take effective precautions against the danger of fire on the bus constitutes cruel and unusual punishment in violation of the Eighth Amendment. The Court of Appeals reversed a jury's finding of liability against three of the defendants, holding that since the plaintiffs presented no evidence of even a single previous instance of fire on a prison bus, no reasonable jury would conclude that the prison's failure to take precautions against the possibilities of fire was either deliberate or reckless. The court stated:

> "In the present case, *even if the defendants' conduct was negligent or even grossly negligent, a reasonable and properly instructed jury could not have found it sufficiently reckless to be called punishment.* To begin with, the danger of a serious accident, though plain enough in retrospect, was not believed to be great and was not objectively so great that Wolff's and Hert's actual knowledge of the danger can be inferred. There had never been a fire on a prison bus in Illinois. This bus had been in service without incident for more than a year before the fire. The plaintiffs' able counsel presented no evidence of even a single instance in the history of this country (or for that matter any other country) of a fire on a prison bus or other vehicle in which someone was being transported under restraint. Obviously there have been such fires but they must be exceedingly rare."

780 F.2d 649 (emphasis added).

In *Thomas v. Pate*, 493 F.2d 151, 158 (7th Cir.), *vacated and remanded on other grounds sub nom. Cannon v. Thomas*, 419 U.S. 813, 95 S. Ct. 288, 42 L.Ed.2d 39 (1974), this court held that a prison doctor inflicted cruel and unusual punishment upon a prisoner when he injected the inmate with penicillin in spite of the fact that he (the prisoner) had advised the doctor prior to the injection, that he was allergic to the drug. The difference in the court's decisions rests upon the fact that unlike the defendants in *Duckworth* and *Estelle*, the defendant in *Thomas* had actual knowledge of "an impending harm easily preventable." *Duckworth*, 780 F.2d at 653. As *Duckworth* points out, "punishment" for Eighth Amendment purposes implies at a minimum *actual knowledge* of such a harm, so that a conscious refusal to prevent the harm can be inferred from the defendant's actions (or inactions). *Id.* In determining whether a prison official's *inaction* constitutes conscious disregard for an inmate's safety, facts such as "a history of accidents or a previous request for repairs that had fallen on deaf ears" are important. *Id.* (*quoting Jones v. Morris*, 777 F.2d at 1280 n.5).

In light of those guidelines, we analyze the defendants' contention that the district court failed to judge the defendants' conduct under the appropriate Eighth Amendment standard. The district court's order states:

> "[its holding] was based upon the evidence that gang activity was a serious security problem at Stateville at the time, *as was known by the two defendants*; that the risk of assault by gang members upon inmates targeted by gangs was real and significant; that plaintiff was, *and was known to be*, such a targeted inmate and therefore a member of an identifiable group of prisoners for whom risk of assault was a serious problem; and that the two defendants, Mellas and Martin, devised and operated a security system which ignored that risk in that targeted inmates in investigative status were housed with other prisoners without any determination of whether those other prisoners were members of a vengeful gang.

> That, in this court's view, constituted deliberate indifference or reckless disregard of the prisoner's right to security."

(Emphasis added).

An examination of the trial court's written order makes clear that the judge considered the legal distinction between the legal test for deliberate indifference to a known hazard as contrasted with gross negligence; and that he applied the proper standard. The findings recited above emphasize that critical to the court's decision was its finding that: (1) officers Mellas and Martin had *knowledge* that "gang activity was a serious problem at Stateville at the time"; (2) the "risk of assault by gang members upon inmates targeted by gangs was real and significant"; (3) "the plaintiff was known to be such a targeted inmate and therefore a member of an identifiable group of prisoners for whom risk of assault was a serious problem"; and (4) that the two defendants "devised and operated a security system which ignored that risk . . . ." In spite of the defendants' awareness of the general risk of gang-related violence against individuals targeted by gangs, the record demonstrates that they failed to institute procedures and safeguards in an attempt to determine whether an inmate to be housed with a gang member is targeted by that gang. In the face of the known risks of gang-related attacks at Stateville, the defendants' failure to establish a procedure for the screening of the file of an inmate to be assigned to the "investigative status" area of the prison to ensure some level of compatibility with his cellmate supports the trial judge's conclusion that the defendants exhibited the kind of "deliberate indifference" to a prisoner's right to security that in this court's view amounts to "punishment" under the *Duckworth* standard. *See also Shelby County Jail Inmates v. Westlake*, 798 F.2d 1085, 1093-94 n.10 (7th Cir. 1986).[3]

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[3] In *Shelby County Jail*, 798 F.2d at 1093-94 n.10, we approved the following jury instruction:

(Footnote continued on following page)

Furthermore, the district court tracked the law set forth in *Walsh I*. In reaching its legal conclusions, it was indeed proper for the trial court to follow the panel's statement of law as establishing the "law of the case." *See Soderbeck v. Burnett County, Wisconsin*, 821 F.2d 446, 449-50 (7th Cir. 1987). Under that doctrine, "we have long held that 'matters decided on appeal become the law of the case to be followed . . . on second appeal, in the appellate court unless there is plain error of law in the original decision.' " *Soderbeck*, 821 F.2d at 449 (quoting *Appleton Electric Company v. Graves Truck Line, Inc.*, 635 F.2d 603, 607 (7th Cir. 1980)). In *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967), the court summarized the doctrine of the law of the case:

> "The 'law of the case' rule is based on the salutary and sound public policy that litigation should come to an end, it is predicated on the premise that 'there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculative chances from changes in its members,' and that it would be impossible for an appellate court to perform its duties satisfactorily and efficiently and expeditiously 'if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal' thereof."

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[3] *continued*

". . . *In order to show callous indifference, plaintiffs must prove the existence of a 'pervasive risk of harm' from other inmates, and that jail officials failed to reasonably respond, knowing of that risk.* A pervasive risk of harm may be established by proving that violence or sexual assaults occur with sufficient frequency that inmates are put in reasonable fear for their safety and to reasonably apprise prison officials of the existence of the problem and the need for protective measures. Once a pervasive risk has been established, it must be determined whether the jail officials reasonably responded to that risk."

Nevertheless, this court has also stated that:

> "The law of the case doctrine, however, is not an immutable concept, and should not be applied where the law as announced is clearly erroneous, and establishes a practice which is contrary to the best interests of society, and works a manifest injustice in the particular case. . . ."

Devines v. Maier, 728 F.2d 876, 880 (7th Cir. 1984) (citations omitted). Although the doctrine of the law of the case is not absolute, the parties fail to convince us to reject it. As explained previously, *Duckworth* requires that a plaintiff establish a "knowing indifference to a risk that is easily preventable," a standard which is entirely consistent with the "identifiable group" theory of liability articulated in *Walsh I*. Consistent with *Duckworth*, the identifiable group theory requires the plaintiff to demonstrate a pattern of assaults upon an identifiable group, so that a conscious refusal to prevent the harm can be inferred. 780 F.2d at 653. *Walsh I*, under the facts of that case, provides a more specific theory of liability under the Eighth Amendment than the *Duckworth* standard: the *Walsh* guidelines are tailored to the situation where a prison's practices and *procedures* for screening the files of inmates assigned to investigative status to determine their involvement in gang-related activities arguably violates the Eighth Amendment. Following the law of the case doctrine, the district judge properly applied the standards set forth in *Walsh I*.

Additionally, the defendants maintain that even if the court utilized the correct legal standard, its application of the facts to that standard were erroneous. The defendants face a most difficult obstacle with this type of argument, since we overturn a district court's factual findings only if they are clearly erroneous. Fed. R. Civ. P. 52(a). Under the "clearly erroneous" standard, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sit-

ting as the trier of fact, it would have weighed the evidence differently." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985). "The clearly erroneous standard insures that the trial on the merits is 'the main event . . . rather than a tryout on the road.' " *AMP, Inc. v. Fleischhacker*, 823 F.2d 1199, 1207 (7th Cir. 1987).

Initially, the defendants argue that the record is devoid of any evidence that either Mellas or Martin had knowledge that placing Lee (a gang member) in Walsh's cell would put Walsh at the risk of an assault. Their argument essentially attacks the court's factual finding that Walsh was "a member of an identifiable group of prisoners for whom the risk of assault was a serious problem of substantial dimensions." *Walsh I*, 733 F.2d at 476. For instance, the defendants refer to Mellas' self-serving testimony that he never intended to place *Walsh* with a dangerous cellmate. Further, Martin testified that he neither knew Walsh, nor did he knowingly expose Walsh to the risk of assault.

Even assuming the truth of that testimony, it evades the point: while the defendants may not have intended to harm Walsh, their failure to respond to the known danger of assault upon a member of an identifiable group of prisoners that are targeted by gangs, with the institution of reasonable screening procedures and safeguards to protect the safety of prisoners from the risk of gang-related violence reaches the Eighth Amendment standard of liability—deliberate indifference to a known hazard—set forth in this court's decision in *Walsh I*. Additionally, following *Duckworth*, the danger of physical assault on a prisoner targeted by gangs was "easily preventable," 718 F.2d at 653; a good faith screening procedure similar to the one utilized for the general population, involving a review of the inmate's files before assigning him a cell or work-detail partner, would most likely reveal if the inmate had a history of previous gang-related activities, and this type of review would have helped to insulate the defendants from a finding that the prison's classification and assignment *procedures* were unconstitutional.

Defendants contend that there is neither enough time nor manpower to screen all the files of inmates assigned to the "investigative status" area of the prison. Excuses of this nature fall on deaf ears when dealing with real and obvious threats to human life in many maximum security prisons. We recognize that "the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions . . . . [and that p]rison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S. Ct. 1861, 1878 (1979). We firmly believe that the failure of prison authorities to even review an inmate's file to determine his or her proclivity for violence and/or whether they are a gang-target in the face of gang-related threats and violence manifest utter disregard for the value of human life. This we will not condone, for in America we respect the sanctity of human life, including those confined in penal institutions.

The increased administrative burden that the defendants assert a decision in Walsh's favor would impose upon the prison system is inconsequential when compared with the value of a proper screening process protecting human life and curbing gang-related violence. Defendants concede that some on-the-spot screening of an inmate's size and experience with other inmates is currently performed with respect to the more permanent housing of double-celled inmates. The added burden of reviewing the inmate's file is not substantial. We agree with the district court that pursuant to *Duckworth*, the fact that "the plaintiff was, and was known to be . . . a targeted inmate and therefore a member of an identifiable group of prisoners for whom risk of assault was a serious problem; and that the two defendants, Mellas and Martin, devised and operated a security system which ignored that risk in that targeted inmates in investigative status were housed with other prisoners without any determination of whether those

other prisoners were members of a vengeful gang," triggers an Eighth Amendment violation.

We thus consider whether the trial court's factual finding that the "plaintiff was and was known to be such a targeted inmate [targeted by gangs] and therefore a member of an identifiable group of prisoners for which risk of assault was a serious problem" is "plausible in light of the record viewed in its entirety." *Anderson*, 105 S. Ct. at 1511-12. The plaintiff testified that he had received numerous threats from gang members while in Cell House E, and that he repeatedly conveyed the information concerning these threats to prison officials. Plaintiff went so far as to write a letter to his counselor about the gang threats, and testified that the letter was placed in his master file. The evidence further supported the belief that Lee was known to prison officials as a gang leader; a report identifying him as such was contained in his master file. Information that is most detrimental to the defendants' cause is that Lee had a tattoo "VL" on his chest, which short of an ad campaign, could not have more clearly advertised and made known to all his Vice Lords' gang affiliation. The tattoo certainly should have been obvious and noted on the prisoner's record by those prison employees who gave Lee a physical upon his reception at the institution before assignment. Given these clear indications of Lee's gang-related activities and the documented threats to Walsh from gang members contained in Walsh's personnel file, the defendants' assertions that they were justifiably unaware of the danger to Walsh posed by gang members rings hollow. Additionally, the record supports the district court's finding that the risk of gang-related attacks was a serious problem at Stateville. Documentary evidence introduced by the plaintiff supports the district court's conclusion that violence was rampant at Stateville and that gang influence pervaded the institution.[4] Based upon the totality of the evidence,

[4] Plaintiff's Exhibit No. 290, is a study dated February 25, 1980 done by the John Howard Association, a prison watchdog group,

(Footnote continued on following page)

the district court found that there was "considerable evidence respecting the frequency of assaults . . . and that the risk of assault by gang members upon inmates targeted by gangs was real and significant." Because there is ample evidence in the record in support of this conclusion, we refuse to hold that it is clearly erroneous. While much of the evidence supporting the court's conclusion consisted of the plaintiff's testimony, that testimony was often corroborated with documentary evidence (e.g. letters and reports contained in his file). The trial judge's conclusion was more than "plausible in light of the record viewed in its entirety," *Anderson*, 105 S. Ct. at 1511-12, and hence, was not clearly erroneous.

III.

Defendants next maintain that they are entitled to qualified immunity based upon their good-faith compliance with the law as it existed in 1979, when the attack against Walsh occurred. *See Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982). Because this issue is raised for the first time in the *second* appeal of this

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[4] *continued*

entitled "Stateville Revisited: 'Shakedown/Shakeup—One Year Later.' " Plaintiff relies upon the statistics contained in this study in his attempt to establish the defendants' knowledge of the danger of gang-related attacks at Stateville. For instance, the study reports that there were 37 *reported* instances of inmate-on-inmate assaults during the period July '78 through Jan. '79, and 61 reported instances of inmate-on-officer assaults. (Plaintiff's Exhibit No. 290, at p. 16). The study also reveals that a subsequent reorganization of the prison resulted in a decline in both inmate-on-inmate and inmate-on-officer assaults (to 18 and 51 respectively) the following year. Information before July of 1978 was not available. But between January '79 and January '80, the number of disciplinary "tickets" issued by the staff increased by 100% from approximately 1,000 per month to over 2,000 per month. (Ex. 290, at p. 10). The study also found that gang influence remained a problem. (*Id.* at p. 3).

case, the question of waiver must be addressed.[5] As with other affirmative defenses upon which the defendants bear the burden of proof, *see Harlow*, 457 U.S. at 815, 102 S. Ct. at 2736; *cf. Powers v. Lightner*, 820 F.2d 818, 821 (7th Cir. 1987), the defense of qualified immunity may be deemed as waived if not properly and timely presented before the district court. In *Walsh I*, the defendants "raised"[6] the defense in their answer to plaintiff's complaint, but failed to bring the argument to the court's attention, despite their having had numerous opportunities to do so.[7] The

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[5] The plaintiff raised the waiver issue for the first time at the appellate level, because the defendants failed to press the qualified immunity defense before the district court. At oral argument, plaintiff's counsel argued that the defendants should have pressed the qualified immunity defense in the *Walsh I* appeal to avoid waiver of the defense. As explained in the text of this opinion, however, the defendants waived their right to this defense because they did not press the issue before the district court in *Walsh I*, and raised it for the first time on this appeal.

[6] A single sentence in their seven-page answer states "Defendants, Nicholas Mellas, Harold Daniels, Mark Nelson, and Walter E. Drew, were acting in good faith within the scope of their duties and responsibilities." (R. 8 at p. 7). Defendants Martin and Franklin, in their separate answer, adopted the defense. It was neither referred to in the brief nor the argument before the trial court.

[7] The defendants filed a number of motions in *Walsh I*, both before and after trial, and there were numerous hearings during which they could have presented the qualified immunity issue had that been their intention. The most appropriate time to raise the issue, of course, would have been in their motion for summary judgment, filed almost fifteen months after the action was initiated. In *Harlow*, the Court stated:

> "Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many substantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official

(Footnote continued on following page)

cases holding that an omission of this character constitutes a waiver of the right to present that issue on appeal are legion. *See, e.g., National Fidelity Life Ins. Co. v. Karaganis*, 811 F.2d 357, 360 (7th Cir. 1986); *Ohio Cas. Ins. Co. v. Bazzi Const. Co., Inc.*, 815 F.2d 1146, 1149 (7th Cir. 1987); *Lazzara v. Howard A. Esser, Inc.*, 802 F.2d 260, 268 (7th Cir. 1986). The mere fact that an obscure reference to defendants' "good faith" is contained in one of the defendants' pleadings does not suffice to preserve that issue for appeal. "[A] trial judge may properly depend upon counsel to apprise him of the issues for decision. He is not obligated to conduct a search for issues which may lurk in the pleadings." *Libertyville Datsun Sales, Inc. v. Nissan Motor Corp.*, 776 F.2d 735, 737 (7th Cir. 1985) (quoting *Desert Palace, Inc. v. Salisbury*, 401 F.2d 320, 324 (7th Cir. 1968)). It is clear from our review of the district court proceedings in *Walsh I* that defendants abandoned the defense.

Additionally, the qualified immunity defense was not raised on appeal in support of the district court's holding in *Walsh I*. Defendants contend that the failure to press

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[7] *continued*

could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed."

102 S. Ct. at 2738. The defendants' summary judgment motion, however, failed to contain even a passing reference to qualified immunity. Just this term, the Supreme Court again emphasized what has always been the central purpose of the qualified immunity defense: "To protect public officials from the 'broad ranging discovery' that can be particularly disruptive of effective government. For this reason, we have emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation." *Anderson v. Creighton*, ___ U.S. ___, 107 S. Ct. 3034, 3042 n.6 (quoting *Harlow, supra*, 457 U.S. at 817, 102 S. Ct. at 2737-38 (1982)). Defendants' delay in pursuing the qualified immunity issue has frustrated these important goals.

the issue on appeal is excusable since they were at the time *defending* a district court decision that did not address the issue of qualified immunity. True, the district court did not address the issue, for the parties failed to raise their possible immunity at trial. Defendants' excuse—that they did not raise the issue in the *Walsh I* appeal because the district court did not decide the case on that ground—does not cure the initial problem, for had they lost in the district court, they still would have been precluded from advancing the qualified immunity defense on appeal because of their failure to raise the issue in the trial court. Once district court proceedings conclude and a defendant fails to raise an affirmative defense, the defendant simply forfeits his or her right to assert that defense on appeal. *National Fidelity*, 811 F.2d at 360. Consequently, defendants' assertion of the defense of qualified immunity on remand from *Walsh I*, which still did not occur until *after* the district court's final decision (upon a motion to alter or amend judgment), and in this second appeal, comes too late. Application of the waiver rule is particularly *apropos* in a case such as this where:

> ". . . factual questions may have been implicated as to which the judge made no finding because the issue was not directly raised and equally, where consideration underlying a subtle legal issue could have been exposed and distilled by the district court so as to facilitate more informed consideration by [an appellate] court."

Johnson v. Artim Transp. System, Inc., 826 F.2d 538, 547-48 (7th Cir. 1987) (quoting *Terkildsen v. Waters*, 481 F.2d 201, 204-05 (2d Cir. 1973)).

There are, of course, narrow exceptions to the waiver rule. A ground for reversal may be raised for the first time on appeal "when the issue presented goes to the district court's subject-matter jurisdiction, if the district court's decision is "plain error," . . . or if there are exceptional circumstances where justice demands more flexibility." *Johnson*, 826 F.2d at 548 (citations omitted). The

reasons set forth by defendants' counsel fail to meet any of the exceptions to the waiver rule.

With respect to the first exception, our jurisdiction over the subject matter of this lawsuit has not been challenged by the defendants, nor have we found any jurisdictional defect. Thus, although issues of subject matter jurisdiction can be raised *sua sponte* at any time whenever a problem becomes evident, *see Clift v. United Auto Workers*, 818 F.2d 623, 626 (7th Cir. 1987), we need not discuss this issue.

The defendants argue that the district court's refusal to extend qualified immunity to Mellas and Martin engendered "plain error." Under the qualified immunity doctrine, government officials performing discretionary functions are shielded from civil damages liability as long as their actions do not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Anderson v. Creighton*, ____ U.S. ____, 107 S. Ct. 3034, 3038 (1987). Defendants contend that immunity should be extended to them since the "identifiable group" theory of liability that the district court utilized did not exist prior to when the Fourth Circuit decided *Withers v. Levine*, 615 F.2d 158 (4th Cir.), *cert. denied*, 449 U.S. 899, 101 S. Ct. 136 (1980), a year after the incident in question. We disagree. In our view, the parameters of the "right" that the defendants violated are sufficiently clear in light of prior decisional law. *See, e.g., Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974) (court held that prison officials have a constitutional duty to take measures to protect against inmate-on-inmate attacks). Although the precise prison practice before us—the lack of a proper procedure for screening the files of prisoners to determine their involvement with gangs before they are assigned a cellmate in the "investigative status" area of the prison—has never been held unlawful, a precisely analogous case holding this practice unlawful is not what is required to pierce an officer's immunity: liability may be imposed where, in light of preexisting law, the unlawfulness is apparent. *See Anderson*, 107 S. Ct. at 3034. It

was not "plain error" for the district court to deny Mellas and Martin qualified immunity.

Finally, defendants have failed to bring to our attention, nor have we discovered in our review of the record, any "exceptional circumstances where justice demands more flexibility" in the application of the waiver rule. We conclude that the defendants have waived the issue of immunity.

IV.

Defendants' last argument is that the district court's award of punitive damages was improper since Walsh neither demonstrated intentional or deliberate indifference to his federally protected rights. *See Smith v. Wade*, 461 U.S. 30, 103 S. Ct. 1625 (1983). They argue that because the defendants "did not violate any statutes, rules and regulations . . . [and because they] acted according to established procedures when they placed Lee in Walsh's cell, [t]he policy of punitive damages [punishment and deterrence] is not furthered by the district court's award in this case." (Appellant's brief, at p. 25). Plaintiff responds that the district court appropriately relied upon the Supreme Court's decision in *Smith v. Wade, supra*, when it awarded punitive damages. Further, plaintiff maintains that the fact that the defendants acted according to procedures established by them does not excuse their reckless failure to institute constitutionally adequate safeguards.

We disagree with the defendants' argument that their non-violation of prison rules precludes an award of punitive damages when the adequacy of the prison's procedures themselves are in issue. Were we to accept defendants' contention that compliance with established procedures prevents a punitive damage award, the institution of severely inadequate rules and regulations could not be deterred through the threat of punitive damages. Because this case involves the Eighth Amendment, the level of culpability required for a liability finding is the same as

the punitive damage standard: both require a determination that the defendants acted with deliberate indifference or reckless disregard for the plaintiff's right to security. *Compare Duckworth*, 780 F.2d at 652-53 ("the infliction of suffering on prisoners can be found to violate the Eighth Amendment only if that infliction is either *deliberate, or reckless in the criminal law sense.*") *with Smith*, 103 S. Ct. at 1637 (". . . based on the policies of § 1983, we are content to adopt the policy judgment of the common law—that *reckless or callous disregard* for the plaintiff's rights . . . should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages.") Because the standard required to demonstrate an Eighth Amendment violation meets the punitive damages standard, Walsh's success in establishing that the defendants' conduct violated the Eighth Amendment in that it amounted to a deliberate indifference or reckless disregard for Walsh's right to safety, also suffices to sustain an award of punitive damages. We decline to second-guess the district court's award of punitive damages in the amount of $5,000.

The judgment of the district court awarding the plaintiff Walsh both compensatory and punitive damages is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 3512

THOMAS PATRICK WALSH,

Plaintiff,

vs.

LOU BREWER, et al.,

Defendants.

MEMORANDUM AND ORDER

Following the bench trial of this case, the court entered judgment for certain of the defendants for reasons stated in open court. The court then asked for briefing of the issues respecting the two remaining defendants. For the reasons here stated, judgment is entered for those defendants as well.

The facts relevant to plaintiff's claims against Nicholas Mellas and Harry Martin are largely undisputed. Plaintiff, during an earlier incarceration at Menard in 1973, had helped repulse an attack by gang members upon an office at that facility. He was subsequently threatened by Disciple and Vice Lord gang members. When he was subsequently sent to Stateville for a later offense he asked for, and was granted, protective custody because of his fears for his personal safety stemming from the Menard incident. That protective custody was in cellhouse E.

Walsh testified to threats on his life while in cellhouse E, his fears for his safety, his observations of inmate-against-inmate violence while in cellhouse E, his communication of his fears to the prison authorities, his unsuccessful requests for transfer and, finally, his request to be "walked" to cellhouse B East in order to be on 24-hour lockup. Other evidence supports the conclusion that inmate apprehensions about their personal security, prior to the January 1979 attack which gives rise to this claim, were real and reasonable. The attack did not occur, however, in cellhouse E, or while Walsh was in the general prison population. Walsh's prior Menard experience, coupled with the conditions he experienced in cellhouse E, caused him to seek greater protection, and it is the defendant's institutional response to that which is relevant to plaintiff's claim.

Defendant Nicholas Mellas was then the assistant warden for operations. His responsibilities included supervision of the staff, maintaining safety and security measures and directing the implementation of rules and regulations for the custody of inmates. Defendant Harry Martin, as chief of security, reported directly to Mellas. His responsibilities included maintaining programs conducive to the security needs of inmates, performing security inspections and planning for the physical care of inmates. They were, in short, the two persons primarily responsible for planning and implementing procedures to meet inmate personal security needs in the institution.

The procedures established to deal with an inmate's request for 24-hour lockup for protective security reasons was as follows: An inmate would request transfer and receive a resident information report, or "ticket." In the ticket, the inmate would be cited for the technical violation of refusing his housing assignment. He would then be "walked" to cellhouse B by a lieutenant. At cellhouse B the inmate was first held in a holding area, while the cellhouse keeper made a cell assignment.

Cellhouse B had two-man cells. They housed persons on investigative status and protective custody overflow from

cellhouse E. An inmate issued a ticket because he was "walked" to cellhouse B East in order to gain greater personal security by 24-hour lockup was, by the procedures then in force, a person under investigation for a violation and was, therefore, in cellhouse B East in investigative status. He was no longer, in practice, considered to be in protective custody on the ground that he had "voluntarily" removed himself from that status. There were some restrictions on double-celling of persons in segregation because of adjudicated rules violations, including a requirement that the master files first be reviewed. Those restrictions did not apply to persons being held on investigative status pending a determination of whether or not there had been a violation. While the cellhouse keeper may have made subjective evaluations of suitable double assignments, based on size, his experience with the inmates then in his charge, and the like, no effort was made to determine specific protective custody needs, checking central records, seeking information concerning specific protective custody needs, screening to reduce the likelihood of violence between cellmates—those simply were not part of the procedure.

Walsh was placed in an empty cell. He was there because of his fear of the Disciples and Vice Lords. At some time thereafter, on January 26, 1979, Frank Lee, known to the prison to be a Vice Lord and probably a Vice Lord leader, was placed in the same cell with Walsh. During the afternoon of January 26, 1979, Walsh was attacked by Lee, which attack included an attempted strangulation with a wire. The severity of the attack was such as to require Walsh's immediate removal from Stateville to a nearby hospital, and his condition was such as to require a delay in questioning him respecting the attack. Lee was later psychiatrically evaluated and transferred to the Menard Psychiatric Center with a preliminary diagnosis of schizophrenia, chronic undifferentiated type.

Were this a claim for injunctive relief, such relief would be fully warranted, unless it has already been provided by the consent decree of July 30, 1981 in *Meeks v. Lane*,

No. 75 C 96 (N.D. Ill.). *See Withers v. Levine*, 615 F.2d 158 (4th Cir.), *cert. denied*, 449 U.S. 849 (1980); *Doe v. Lally*, 467 F.Supp. 1339 (D. Md. 1979). The constitutional right of prison inmates to be secure against assaults by other prisoners and the corollary obligation of correctional authorities to protect inmates from such assaults is beyond dispute. *See Little v. Walker*, 552 F.2d 193, 197 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978); *Spence v. Staras*, 507 F.2d 554, 557 (7th Cir. 1974). The procedure here, by equating a plea for 24-hour lockup for increased protection from a faceless class of enemies to a "voluntary" removal from protective custody, knowingly permitted the incarceration of an inmate in a locked cell with those he reasonably feared. It can hardly be termed anything other than the result of intentional or reckless conduct evidencing a deliberate indifference toward the safety of prisoners. *See Moore v. Department of Corrections*, No. 77 C 2007 (N.D. Ill. March 5, 1980).

> "If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive, it is as much an active tortfeasor as if it had thrown him into a snake pit. It is on this theory that state prison personnel are sometimes held liable under section 1983 for the violence of one prison inmate against another." *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 8/20/82).

Nor would relief be denied if this scenario had unfolded, as well it could have: Lee is placed in cell with Walsh, Lee recognizes Walsh as the man against whom the Vice Lords want revenge, Lee attacks Walsh. The defendants were the officials responsible for prisoner security. They were responsible for the scenario. *Redmond v. Baxley*, 475 F.Supp. 1111 (E.D. Mich. 1979).

The scenario did not, however, so unfold. Plaintiff does not suggest that Lee ever knew that plaintiff was a Vice Lords target. The cause of the attack was unrelated to the 1973 Menard incident; Lee attacked Walsh, but not as a vengeful gang member.

The defendants were acting under color of law. Their actions resulted in a deprivation of the plaintiff's constitutional rights. Their actions, however, were not the proximate cause of plaintiff's injuries. The deprivation of rights increased the risk that Walsh would be assaulted by a gang member who sought to retaliate against plaintiff for his actions in 1973. It did not increase the risk that plaintiff would be attacked by an inmate for other reasons unless the likelihood of such an attack was apparent from the unconsulted files of the prison. "It is well established that the defendant is not liable where the harm results from an outside force, the risk of which is not increased by the defendant's conduct." *Black v. Sheraton Corp. of America*, 564 F.2d 531, 548-549 (D.C. Cir. 1977). *See, generally*, Prosser, *Handbook of the Law of Torts*, §44 (4th Ed. 1971).

Neither Walsh nor Lee had been classified as so aggressive or so vulnerable as to necessitate 24-hour lockup. Walsh was of average size; Lee was considerably smaller, weighing about 130 pounds. Lee (and Walsh) had been written up for minor infractions, but he had no history of assaultive behavior at Stateville. There was, in his file, a psychological evaluation which described him as "sullen, antagonistic, angry, dangerous, explosive, completely peer-oriented . . . ." There was, as well, a determination that no severe psychopathology was evident. No evidence was introduced whether or not such a report should have made his later attack on Walsh reasonably foreseeable. Given the maximum security nature of Stateville and the nature of the offenses which cause its inmates to be there, it is questionable whether that report should have alerted the prison authorities that Lee should be viewed with special concern, and this court cannot assume that it would have. The attack can be viewed as the result of the unfortunately increased risks occasioned by double occupancy of cells in a maximum security institution, but that practice has been deemed constitutional by the Court of Appeals, *Smith v. Fairman*, 690 F.2d 122 (7th Cir. 1982).

For the reasons stated, judgment is entered for defendants.

/s/ James B. Moran
Judge, United States
District Court

December 22, 1982.

APPENDIX C

[733 F.2d 473 (1984)]

Thomas Patrick WALSH,
Plaintiff-Appellant,
v.
Lou v. BREWER, et al.,
Defendants-Appellees.

No. 83-1059.

United States Court of Appeals,
Seventh Circuit.

Argued Jan. 18, 1984.
Decided May 3, 1984.

* * * * *

Before BAUER, FLAUM, Circuit Judges, and SWYGERT, Senior Circuit Judge.

BAUER, Circuit Judge.

Plaintiff Walsh claims that six Stateville Correctional Center officials violated his eighth and fourteenth amendment rights.* Walsh is currently an inmate at the Menard

* Although Walsh named Stateville Warden Lou Brewer as a defendant in this suit, Brewer left Stateville shortly after Walsh's assault and never was served. The issue of Brewer's liability thus is not before us.

Correctional Center. Walsh brought this action for damages under 42 U.S.C. § 1983 (1976) after he was assaulted by his cellmate at Stateville in 1979.

The district court held that the two defendants primarily responsible for inmate security at Stateville, Nicholas Mellas and Harry Martin, deprived Walsh of his constitutional rights, but were not liable to Walsh for damages. The court also held that the other four defendants did not violate Walsh's rights. Because the record before us does not clearly reflect the basis for the court's holding that Mellas and Martin violated Walsh's constitutional rights, we vacate its decision and remand for further consideration. If the district court again determines that Mellas and Martin deprived Walsh of his constitutional rights, the court then should award appropriate damages. We affirm the court's holding with respect to the other four defendants.

I

Walsh was incarcerated at Menard in 1973. While at Menard, Walsh helped officials repulse an attack on a prison office by inmate members of street gangs. After this incident, members of the Disciples and Vice Lords gangs at Menard threatened Walsh. Walsh later was released from Menard.

In 1978 Walsh was sent to Stateville to serve sentences for three felony convictions. Because Walsh feared that gang members at Stateville would retaliate against him for his role in the Menard incident, Walsh asked prison officials to put him in protective custody in Cell House E. The prison officials granted Walsh's request. Walsh still feared for his safety in Cell House E, though, and he asked to be transferred to another prison. Stateville officials denied his request. Walsh then asked to be placed on twenty-four hour lockup in Cell House B, which housed inmates who violated a prison rule or were awaiting a disciplinary committee hearing. Some inmates apparently believed that twenty-four hour lockup was more secure

than protective custody, and thus they would commit a technical violation of prison rules to gain admittance to twenty-four hour lockup. In order to be assigned to Cell House B, therefore, Walsh improperly refused his cell assignment and was charged with a disciplinary violation. Walsh was placed in Cell House B on January 24 or 25, 1979.

Stateville officials regularly assigned two men to a cell in Cell House B. Before double-celling inmates guilty of rules violations, officials were required by regulation to determine the prisoners' compatibility by checking their prison files. Prison officials, however, did not apply this regulation to inmates awaiting disciplinary hearings. In these cases, the cell house keeper made double assignments based on his evaluation of the inmates' size and his experiences with the inmates.

The Cell House B keeper assigned Walsh to an empty cell. On January 25, the keeper assigned another inmate, Frank Lee, to Walsh's cell. Lee was a Vice Lords gang member. Defendant Edward Franklin, a lieutenant, took Lee to the cell. Walsh testified that he immediately asked Franklin not to put Lee in the cell; Franklin testified that he could not recall Walsh making such a request. Walsh stated at trial that early the next morning, Lee stabbed him in the back and strangled him into unconsciousness with a wire.

At noon, the prison Adjustment Committee came to Walsh's cell to adjudicate his disciplinary charge. Defendants Daniels, Drew, and Nelson were the committee members. Walsh testified that he showed the committee members his stab wounds and requested immediate medical attention. The defendants all testified that they neither saw stab wounds nor observed anything unusual about Walsh. The defendants did agree that Walsh asked to go to sick call, and Daniels stated that he conveyed Walsh's request to the cell house keeper in accordance with standard Stateville procedures.

Later that afternoon, Lee assaulted Walsh by repeatedly strangling him with a wire. Prison officials found Lee standing over Walsh with a wire around Walsh's neck. The officers sent Walsh to the Stateville emergency room, and then to a hospital in Joliet for two days.

The district court found that Stateville's procedures, "by equating a plea for 24-hour lockup for increased protection from a faceless class of enemies to a 'voluntary' removal from protective custody, knowingly permitted the incarceration of an inmate in a locked cell with those he reasonably feared." R. 79, at 4. The court ruled that placing a gang member in Walsh's cell constituted deliberate indifference toward Walsh's safety in violation of his eighth amendment right to be free from cruel and unusual punishment. The court held Mellas and Martin responsible for violating Walsh's rights.

The court nevertheless held that Mellas and Martin were not liable to Walsh for damages because the deprivation of Walsh's rights was not the proximate cause of the assault. The court stated: "Plaintiff does not suggest that Lee ever knew plaintiff was a Vice Lords target. The cause of the attack was unrelated to the 1973 Menard incident; Lee attacked Walsh, but not as a vengeful gang member." R. 79, at 5. The district court further ruled that prison officials would not have known that Lee was likely to attack Walsh for other reasons even if they had consulted Lee's files. The court noted that Lee's file showed that he had no history of assaultive behavior at Stateville. In addition, the court declined to assume that Lee's psychological evaluation, which described him as "sullen, antagonistic, angry, dangerous, explosive, completely peer-oriented," would have alerted officials that Lee was more dangerous than many of the other inmates at the Stateville maximum security facility.

Walsh does not contend that Lee's attack was related to the gang threats of retaliation. Instead, Walsh argues that prison officials should not have placed Lee in his cell because Lee was a gang member and because Lee's rec-

ord showed that he was "unstable and violent." Walsh also claims that he is entitled to damages.

II

We will overturn the district court's factual findings only if they are clearly erroneous. Fed.R.Civ.P. 52(a). Walsh contests the court's finding that prison officials would not have been alerted to the danger of placing Lee with another inmate had they examined Lee's file. Our examination of the record convinces us that the court's finding is not clearly erroneous.

We believe, however, that the district court's legal analysis is incomplete. The court does not explain adequately its basis for holding that Mellas and Martin violated Walsh's constitutional rights. The court held that although Lee's attack was not gang-related, exposing Walsh to the risk of gang attack by placing Lee in his cell constituted deliberate indifference to Walsh's rights.

Prison officials who show "deliberate indifference" to violent inmate attacks deprive inmates of their eighth amendment rights. *Little v. Walker*, 552 F.2d 193 (7th Cir.1977), *cert. denied*, 435 U.S. 932, 98 S.Ct. 1507, 55 L.Ed.2d 530 (1978). Although this guarantee generally is implicated only when an inmate is assaulted, risks to an inmate's safety alone may violate his rights when the threats are so constant that a virtual "reign of terror" exists. *See Murphy v. United States*, 653 F.2d 637 (D.C.Cir.1981); *Jones v. Diamond*, 636 F.2d 1364 (5th Cir.), *cert. dismissed*, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981); *Withers v. Levine*, 615 F.2d 158 (4th Cir.), *cert. denied*, 449 U.S. 849, 101 S.Ct. 136, 66 L.Ed.2d 59 (1980). Although Walsh does not rely specifically on these cases, he does claim that "Mellas and Martin had knowingly permitted an atmosphere of lawlessness and violence to prevail at Stateville." Appellant's br. at 19. The district court's order does not discuss whether the evidence showed that the inmates at Stateville were exposed to an unconstitutionally high risk of harm, and thus we vacate and remand the

court's decision for further consideration of the evidence. To show that the Stateville procedures were unconstitutional, the record must indicate either that assaults occurred so frequently that they were "pervasive," *Murphy*, 653 F.2d at 644, or that Walsh belonged to an "identifiable group of prisoners" for whom "risk of . . . assault [was] a serious problem of substantial dimensions," *Withers*, 615 F.2d at 161. Absent either of these showings, the district court should hold that Mellas and Martin did not violate Walsh's constitutional rights.

If the record shows that Stateville's procedures were unconstitutional, the court then should award Walsh appropriate damages. Walsh has not sought injunctive or declaratory relief. He also is not entitled to compensation for injuries from Lee's attack, because the district court found that the attack did not result from any defects in Stateville's inmate assignment procedures. The court should consider compensation for harm, if any, resulting from the constitutional violation, and appropriate compensation for the constitutional violation itself. *See generally Lenard v. Argento*, 699 F.2d 874, 891 (7th Cir.1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 69, 78 L.Ed.2d 84 (1983).

III

The district court ruled that Defendants Franklin, Daniels, Drew, and Nelson did not violate Walsh's constitutional rights. We affirm these rulings.

Franklin's regular assignment as a lieutenant at Stateville was to escort inmates to their new cell assignments. The district court found that Franklin followed standard procedures in escorting Lee to Walsh's cell and "it is difficult to see how anything he did . . . could give rise to the level of constitutional tort." Tr. at 448. Walsh claims that he asked Franklin not to place Lee in his cell. Even if Walsh's account is accurate, we decline to impose liability on Franklin merely because he did not grant Walsh's request. Franklin did not make cell assignments, and he apparently was unaware of the gang threats against Walsh.

The district court's ruling on the liability of Defendants Daniels, Drew, and Nelson hinged on its evaluation of witness credibility. The court acknowledged Drew's long experience with prisoner services and emphasized that none of the three defendants remembered seeing Walsh's stab wounds: "If Mr. Walsh had pulled up his shirt and his back was bloody and he had been stabbed, that certainly would be something that [the defendants] would not only recall but I believe they would have acted upon at the time." Tr. at 466. The court concluded that Walsh had conveyed "no sense of a medical emergency or a sense of grave personal threat" to the defendants, and thus the defendants did not violate Walsh's constitutional rights. Tr. at 466-67. We defer to the trial court on issues of credibility absent clear error. *Sherkow v. Wisconsin*, 630 F.2d 498 (7th Cir.1980). The record indicates that the trial court did not err in its evaluation, and thus we affirm its ruling.

IV

We affirm the district court's ruling with respect to Defendants Franklin, Daniels, Drew, and Nelson. We vacate and remand that portion of the court's decision concerning Defendants Mellas and Martin for further consideration consistent with this opinion.

AFFIRMED IN PART AND VACATED AND REMANDED IN PART.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 3512

THOMAS PATRICK WALSH,

Plaintiff,

vs.

LOU BREWER, et al.,

Defendants.

MEMORANDUM AND ORDER

Some years ago this court tried to conclusion this action and found for the defendants. The finding with respect to two of the defendants, Mellas and Martin, was based not on a determination that their conduct was not actionable, but that their conduct did not proximately cause injury to the plaintiff. The Court of Appeals, more than two years ago, reversed with respect to those two defendants. The court had two concerns. One was whether the evidence showed that the plaintiff was exposed to an unconstitutionally high risk of harm. The other was that this court did not consider appropriate compensation for the constitutional violation itself. The parties thereafter submitted memoranda respecting the Court of Appeals opinion to this court, but then decided to seek to settle the action themselves. When protracted negotiations failed

to resolve the controversy the parties then turned back to the court for a ruling in light of the Court of Appeals opinion and, earlier this year, submitted additional legal materials updating the arguments previously presented. In the meantime the files in this case had long since disappeared into wherever old files go and had to be retrieved. Since then the Supreme Court has also addressed the question of damages in a §1983 case in *Memphis Community School District v. Stachura*, 54 U.S.L.W. 4771 (U.S. June 25, 1986).

The Court of Appeals ruled that the evidence must indicate either that assaults occurred so frequently that they were "pervasive," or that Walsh belonged to an "identifiable group of prisoners for whom risk of . . . assault (was) a serious problem of substantial dimensions," *Walsh v. Brewer*, 733 F.2d 473, 476 (7th Cir. 1984). There was considerable evidence respecting the frequency of assaults. This court's ruling was not based, however, on that evidence. Rather, it was based on the evidence that gang activity was a serious security problem at Stateville at the time, as was known by the two defendants; that the risk of assault by gang members upon inmates targeted by gangs was real and significant; that plaintiff was, and was known to be, such a targeted inmate and therefore a member of an identifiable group of prisoners for whom risk of assault was a serious problem; and that the two defendants, Mellas and Martin, devised and operated a security system which ignored that risk in that targeted inmates in investigative status were housed with other prisoners without any determination of whether those other prisoners were members of a vengeful gang. That, in this court's view, constituted deliberate indifference or reckless disregard of the prisoner's right to security. Subsequent Supreme Court cases, *e.g.*, *Davidson v. Cannon*, ____ U.S. ____, 106 S.Ct. 668 (1986), have not changed that standard.

Plaintiff, after remand, sought damages both for emotional distress and for the constitutional violation. He sought punitive damages as well. The Court of Appeals directed

this court to "consider compensation for harm, if any, resulting from the constitutional violation, and appropriate compensation for the constitutional violation itself." *Walsh*, 733 F.2d at 477. That left somewhat uncertain whether this court should award compensation related to the abstract value of the right to be secure from inmate assaults, but that uncertainty has since been removed by *Memphis Community School District v. Stachura*. A unanimous Supreme Court there held that damages based on the abstract value of constitutional rights are not a permissible element of compensatory damages in §1983 cases. The Court there recognized, however, that, while damages were limited to compensation for injuries sustained, the violation of a constitutional right could itself be a compensable injury. Thus, damage awards should not be rigidly bound to common law concepts.

The distinction here, however, is more academic than actual. The evidence established that plaintiff protested Lee being put in his cell at the outset. At some time thereafter, long before the assault which resulted in plaintiff's hospitalization, plaintiff was aware that Lee was assaultive and unpredictable. True it is that the evidence of actual injury other than the assault was not particularly strong, but this is a case where both the inference and presumption of injury aid the plaintiff. He was in tight confinement. During the hours they were together plaintiff did not know whether or not Lee was a member of the gang he feared and he could not know whether Lee, if so, would come to recognize plaintiff as a targeted inmate. He sat by the bars of his cell all night after Lee first assaulted him. There was, this court believes, both personal humiliation and mental anguish and suffering caused by the constitutional violation. Given the duration of the mental and emotional distress, this court concludes that $2500 is fair compensation.

We believe, moreover, that some punitive damages are appropriate. There was no showing of malice or ill will. This court was persuaded that the defendants did not specifically recognized the increased risks which the pro-

cedures they followed had created. Rather, they failed to think through the implications of those procedures. This court believes that that failure was more than negligence and rose to a level of reckless indifference, the threshold legal standard for both compensatory and punitive damages, *Smith v. Wade*, 461 U.S. 30 (1983). While compensatory damages are mandated and punitive damages are not, the great potential of serious consequences when the keepers are indifferent to the kept leads this court to impose punitive damages of $5,000 as a deterrent to indifference in the future.

/s/ James B. Moran
Judge, United States
District Court

July 16, 1986.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 3512

THOMAS PATRICK WALSH,

Plaintiff,

vs.

NICHOLAS MELLAS and
HARRY MARTIN,

Defendants.

Chicago, Illinois, August 1, 1986, 9:30 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES B. MORAN

APPEARANCES:

For the Plaintiff: MR. DON RAY SAMPEN

For the Defendants: MS. LAURA RECTOR

K. JOSEPH SNYDER, RPR, CSR
Official Reporter
United States District Court
219 South Dearborn Street, Room 2342
Chicago, Illinois 60604
Telephone: (312) 939-2059

THE CLERK: 79 C 3512, Walsh versus Brewer, et al.; motion to alter, amend, or clarify judgment.

MR. SAMPEN: Don Sampen for the plaintiff, Your Honor.

MS. RECTOR: Laura Rector, assistant Attorney General, on behalf of defendants.

Your Honor, I think the motion is fairly self-explanatory. I don't feel any need for the defendants to file any additional briefs in this case. I certainly appreciate the need to resolve this as soon as possible.

THE COURT: I agree. I mean, some things just never seem to come to an end.

I am going to clarify in one respect: that is, that the liability is joint and several.

MR. SAMPEN: Even as to punitive damages?

THE COURT: Even as to the punitive. Otherwise, I am going to deny. I do believe that it was clear in 1979 that a prisoner had a right to be free from an unreasonable risk of assault, and that supervisors had a duty to safeguard that right.

MS. RECTOR: All right. Thank you, Your Honor.

MR. SAMPEN: Thank you, Judge.

(Proceedings concluded.)

CERTIFICATE

I, K. Joseph Snyder, do hereby certify that the foregoing is a complete transcript of the proceedings before the Honorable JAMES B. MORAN on August 1, 1986.

/s/ K. Joseph Snyder

Supreme Court, U.S.
FILED
MAY 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1765

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

NICHOLAS MELLAS and HARRY MARTIN (deceased),

Petitioners,

vs.

THOMAS PATRICK WALSH,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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*Counsel of Record

QUESTIONS PRESENTED

I. Did the Seventh Circuit correctly hold that petitioners were not entitled to qualified immunity: (a) where petitioners waived the defense by not raising it in their summary judgment motion and by only making obscure references to their good faith at trial and in selected pleadings; and (b) where the parameters of the constitutional right petitioners violated were clearly established in 1979 at the time they acted?

II. Is the Seventh Circuit's holding that petitioners violated respondent's eighth amendment rights by failing to institute any procedures for reviewing inmate files prior to cell placement in conflict with a Fifth Circuit decision finding no violation where existing procedures proved inadequate?

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No. 87-1765

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

NICHOLAS MELLAS and HARRY MARTIN (deceased),

Petitioners,

vs.

THOMAS PATRICK WALSH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent Thomas P. Walsh agrees with petitioners' recitation of the facts underlying this matter and with petitioners' recitation of the procedural history of Walsh v. Brewer, 733 F.2d 473 (7th Cir. 1984) ("Walsh I"), but disagrees with petitioners' characterization of the second opinion of the court of appeals in Walsh v. Mellas, 837 F.2d 789 (7th Cir. 1988) ("Walsh II"). Therefore, respondent will only include a brief statement of the underlying facts and will set forth his own statement of the opinion below.

This matter arises out of the strangulation of respondent by his cellmate, a member of a prison gang, at Stateville Correctional Center in Joliet, Illinois. The district court found that respondent had been targeted for attack by prison gangs; that the risk of assault under those circumstances was real and significant; and that petitioners devised and operated a security system which ignored that

risk. (Pet. App. at 39.)[1/] Based upon its findings, the district court awarded Walsh $2,500 as compensation for personal humiliation and mental anguish caused by the deprivation of his constitutional rights. Further, the district court awarded punitive damages of $5,000 because petitioners' conduct constituted deliberate indifference to a known hazard.

On appeal in Walsh II, petitioners argued, inter alia, that they were entitled to qualified immunity and that the district court failed to apply the proper eighth amendment standards. The court of appeals rejected both arguments. First, the court held that the petitioners had waived the qualified immunity defense because petitioners did not raise the issue in their summary judgment motion and made only obscure references to the defense in selected pleadings. The court stated that "the mere fact that an obscure reference to defendants' 'good faith' is contained in one of the defendants' pleadings does not suffice to preserve that issue for appeal." (Pet. App. at 20.)

Alternatively addressing the merits of petitioners' qualified immunity defense, the court of appeals rejected petitioners' argument that they were entitled to immunity. The court held that the parameters of the constitutional right petitioners violated were sufficiently clear in light of prior decisional law, citing as an example, Spence v. Staras, 507 F.2d 554 (7th Cir. 1974). Relying on Anderson v. Creighton, 107 S. Ct. 3034 (1987), the court held that liability may be imposed where, in light of preexisting law, the unlawfulness of the official's conduct is apparent. Accordingly, petitioners could not assert that they acted in good faith. (Pet. App. at 22-23.)

1/ The district court initially entered a finding of no liability. (Pet. App. at 29.) The Seventh Circuit reversed and remanded the matter in Walsh I. (Pet. App. at 31-37.)

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PERTAINING TO QUALIFIED IMMUNITY DO NOT MERIT THIS COURT'S ATTENTION AND WERE DECIDED CORRECTLY BELOW.

A. The Question Whether Petitioners Waived The Affirmative Defense Of Qualified Immunity Does Not Merit This Court's Attention And Was Decided Correctly Below.

Petitioners do not dispute that the defense of qualified immunity may be deemed waived if not properly and timely presented to the district court. Rather, petitioners complain that the court of appeals erred in concluding, based upon the record established in the original trial on the merits, the first appeal, and the proceedings on remand, that petitioners "failed to bring the argument to the [district] court's attention, despite their having numerous opportunities to do so" (Pet. App. at 19), and did not raise it in the initial appeal. (Pet. App. at 21.) Petitioners invite this Court to re-review the extensive record below and second-guess the conclusion of the court of appeals. This matter does not merit the attention of this Court.

Moreover, the court of appeals correctly concluded that petitioners' failure to raise qualified immunity precluded the district court from making certain findings and therefore constituted a waiver of the defense. The court observed (Pet. App. at 21):

> [F]actual questions may have been implicated as to which the judge made no finding because the issue was not directly raised and equally, where consideration underlying a subtle legal issue could have been exposed and distilled by the district court so as to facilitate more informed consideration by [an appellate] court.2/

2/ Qualified immunity protects "public officials from the 'broad ranging discovery' that can be particularly disruptive of effective government. For this reason, [this Court has] emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation." Anderson v. Creighton, 107 S. Ct. 3034, 3042 n.6 (1987), quoting Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982). The (Footnote Continued)

The court of appeals properly relied upon the decisions in Ohio Casualty Insurance Co. v. Bazzi Construction Co., Inc., 815 F.2d 1146 (7th Cir. 1986), and National Fidelity Life Insurance Co. v. Karaganis, 811 F.2d 357 (7th Cir. 1987), to hold that petitioners' few obscure references to "good faith" failed to present, and thus preserve, the qualified immunity defense. In Ohio Casualty, the plaintiff mentioned the exclusionary provisions of an insurance contract in one of its memoranda but failed to explain the significance of these provisions to the district court. 815 F.2d at 1149. In National Fidelity, the plaintiff failed to address the significance of an issue mentioned in its complaint. 811 F.2d at 360. In each case, the court held that a party must "press" an issue to the district court by explaining its relevance and significance to preserve it for appeal; mere mention, or obscure references, do not suffice. (Pet. App. at 19-20.)

Petitioners also argue that they were excused from raising qualified immunity in their motion for summary judgment because the standards for qualified immunity prior to this Court's decision in Harlow v. Fitzgerald, 457 U.S. 800 (1982), included a subjective good faith component that was within the province of the jury. (Pet. at 16.) Petitioners' argument that good faith could not be decided on summary judgment before Harlow, however, is erroneous. See, e.g., Procunier v. Navarette, 434 U.S. 555 (1978); Henzel v. Gerstein, 608 F.2d 654, 658-59 (5th Cir. 1979). In any event, as the court of appeals found, petitioners' waiver extended beyond the summary judgment proceedings through trial, appeal, and remand.

(Footnote Continued)
court of appeals concluded that petitioners' delay in pursuing qualified immunity frustrated these important goals. (Pet. App. at 20 n.7.)

B. The Question Whether Petitioners Are Entitled To Qualified Immunity Does Not Merit This Court's Attention And Was Decided Correctly Below.

Even if an adequate record had been made below concerning the belated claims of qualified immunity, the question petitioners would put to this Court is of no significance beyond this case: whether the state of precedent in 1979 was sufficiently clear to inform petitioners of their constitutional obligations to respondent. This question likewise does not merit the attention of this Court.

Petitioners' efforts to distinguish between their conduct and respondent's cause of action is unavailing, and creates no "cert-worthy" question. As the court of appeals noted (Pet. App. 22-23), this Court's recent decision in Anderson v. Creighton, 107 S. Ct. 3034, 3039 (1987), held that an official cannot escape liability based upon qualified immunity as long as "[t]he contours of the right" he is alleged to have violated were sufficiently clear so that a reasonable official would understand that what he is doing violates that right. As this Court observed: "This is not to say that an official action is protected by qualified immunity unless the very action has been held unlawful but it is to say that in the light of preexisting law the unlawfulness must be apparent." Id. (emphasis added; citation omitted). See also Wade v. Hegner, 804 F.2d 67, 71 (7th Cir. 1986) (under Harlow the objective inquiry focuses on whether the legal norms governing official's behavior were clearly established).[3/]

3/ In Little v. Walker, 552 F.2d 193, 197 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978), the Seventh Circuit warned that a prison official:

> cannot hide behind a claim that the particular factual predicate in question has never appeared in haec verba in a reported opinion. If the application of settled principles to this factual tableau would inexorably lead to a

(Footnote Continued)

The contours of the right of prison inmates to be protected from inmate-on-inmate attacks were well established before petitioners' unlawful conduct. Deliberate indifference to such attacks was a constitutional violation. See, e.g., Little v. Walker, 552 F.2d 193, 197 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978); Finney v. Arkansas Board of Corrections, 505 F.2d 194, 201 (8th Cir. 1974); Woodhous v. Commonwealth of Virginia, 487 F.2d 889, 890 (4th Cir. 1973). That the courts below vindicated this preexisting constitutional right by following a line of analysis that was subsequently labelled "the identifiable group theory" of liability does not mean that respondent's rights, or petitioners' duties, were any less obvious. Given the clear law establishing a constitutional obligation to protect inmates from violent inmate attack, a reasonable official would have understood that he had an obligation to protect identifiable groups of prisoners for whom the risk of assault is a serious problem.

Moreover, in light of preexisting law, the unlawfulness of petitioners' conduct was apparent. Anderson v. Creighton, 107 S. Ct. at 3039. Decisional law prior to petitioners' deprivation of respondent's rights indicated that petitioners would be subject to liability if they failed to take adequate steps to protect individuals or identifiable groups in prison subject to the risk of assault, even in the absence of pervasive violence. See Spence v. Staras, 507 F.2d 554, 557 (7th Cir. 1974); West v. Rowe, 448 F. Supp. 58, 60 (N.D. Ill. 1978); McCary v. Sullivan, 509 F.2d 1332, 1334 (5th Cir. 1973), cert. denied, 423 U.S. 859 (1975).

(Footnote Continued)
conclusion of unconstitutionality, a prison official may not take solace in ostracism.

II. THE DECISION OF THE SEVENTH CIRCUIT DOES NOT CONFLICT WITH THE DECISION OF THE FIFTH CIRCUIT IN JOHNSTON V. LUCAS.

Petitioners also attempt to persuade this Court to grant the writ of certiorari by asserting that the decision below conflicts with the Fifth Circuit's decision in Johnston v. Lucas, 786 F.2d 1254 (5th Cir. 1986). Johnston, however, does not conflict with the decision below. To the contrary, the two courts of appeals applied the same legal standard to determine whether the conduct of the defendant prison officials amounted to an eighth amendment violation: did the prison officials' conduct constitute deliberate indifference. Compare Pet. App. at 8-18 with Johnston v. Lucas, 786 F.2d at 1260.

In Johnston, the inmate plaintiff was stabbed after a known enemy of the plaintiff was placed in the same building with plaintiff. The district court held that defendants violated the eighth amendment by not implementing adequate procedures that would have prevented the stabbing. 786 F.2d at 1259-60. It premised that holding, however, upon a finding that defendants were negligent, but not consciously indifferent, in failing to prevent the stabbing. The court of appeals reversed, holding that the district court's factual finding that the defendant prison officials did not act with "conscious indifference" precluded finding an eighth amendment violation. Id.

In contrast, the district court in this case found as one of its findings of fact that the defendants before it had acted with "deliberate indifference" to respondent's rights. (Pet. App. at 39.) The court of appeals held that the eighth amendment was violated because, in spite of petitioners' knowledge of the risk of gang-related violence against individuals targeted by gangs, they completely failed to institute procedures to determine whether an inmate to be placed in the same cell with a gang member was targeted by the gang. (Pet. App. at 12.) Furthermore, the court of appeals, upon careful review of the record, affirmed

the district court's underlying findings of fact as "not clearly erroneous." (Pet. App. at 14-18.)[4/]

The different outcomes in Johnston and the case at bar result from factual differences in the two cases. There is no conflict among the circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS P. WALSH

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Dated: May 20, 1988

4/ Petitioners also assert, without any factual support in the record, that the holding below "presents prison officials with an impossible task." (Pet. at 14-15.) The court of appeals expressly considered the increased burden in this case, and found that such concerns were outweighed by the real and obvious threats to human life that exist in maximum security prisons. (Pet. App. at 16.) The court found that any increased administrative burden upon the prison system would be "inconsequential when compared with the value of a proper screening process protecting human life and curbing gang-related violence." (Id.)